PROGRESS OF THE LAW.

As Marked by Decisions selected from the Advance Reports.

Assignment for Creditors, Priority of Unrecorded Mortgage

In *First Nat. Bank of El Reno* v. *Salyer*, 50 Pac. (Okl.) 76, the bank asserted a preference against an assignee for the benefit of creditors as to certain property on which the bank had a chattel mortgage, which it had failed to record, in spite of a statute declaring unrecorded chattel mortgages void as against the creditors of the mortgagor. The bank replied upon the old argument that "the assignee took no higher rights nor better title than the assignor;" but the court properly replied that this rule could not be relied upon to validate a transaction which, but for the assignment, was unquestionably invalid by statute. This decision was reaffirmed upon a rehearing: *First Nat. Bank* v. *Salyer*, 50 Pac. 77, the court admitting that the common law rule was contrary, as well as the decisions under the United States Bankruptcy Act, but declaring that the effect of the local statute was to make the assignee a trustee for creditors.

Banks and Banking, Deposits in Insolvent Bank

Following *Bruner* v. *Bank*, 37 S. W. (Tenn.) 286 (1896), it is held in *Williams* v. *Cox*, 42 S. W. (Tenn.) 2, (1) that a depositor who deposits a check when the bank is known by its officers to be insolvent, can recover the proceeds if they can be identified; and (2) when the check was collected by a foreign correspondent bank after the failure of the first bank, it was its duty to transmit them intact to the receiver, and it will be presumed that this was done, and that the money which it retained to indemnify it against certain rediscounts was retained out of money collected before the failure.

Harris v. *First Nat. Bank of Johnson City*, 41 S. W. (Tenn.) 1084, merely reiterates the principle that a bank which receives a deposit under circumstances such as those detailed above will be compelled to refund. The transaction is voidable on account of the fraud, and the decision logically carries the principle one step further by holding that the deposit (in this case a certificate on another bank) could be recovered from a third bank, to which it had been forwarded as collateral

for a pre-existing debt, which is not enough to constitute the transferee a *bona fide* holder for value.

Power of Bank to Hold Land

The Court of Chancery of Tennessee, following the trend of modern decisions, has held that a statute which provided that a state bank should not own real estate more than sufficient for the conduct of its business, unless taken in payment of debts, was not violated by the bank's taking a mortgage security upon real estate for the repayment of money loaned: *Alexander* v. *Brummett*, 42 S. W. 63.

Beneficial Association, Dues

Where a subordinate lodge of a beneficial order receives dues from its members, which dues are, according to the constitution, laws and by-laws of the order, to be used only for certain purposes set forth therein, they become immediately impressed with a trust, and an appropriation of such dues to any other object is a breach of the trust: *Schubert Lodge, No. 118, Knights of Pythias of New Jersey* v. *Schubert Kranken Unterstuetzungs Verein et al.* (Court of Chancery of Jersey) 38 Atl. 347.

Bill of Exchange, Interest

The acceptor of a draft, in terms payable on the completion of a certain building, is not liable until notified of the completion of the building, and interest thereon only runs from the date of such notice: *Peck* v. *Granite State Provident Association*, 46 N. Y. Suppl. (Supreme Court) 1042. The facts in this case are meagrely reported, but it is assumed that the court did not mean to intimate that mere notice of the happening of the condition upon which the liability of the acceptor attached, obviates the necessity of presentment of the draft at the acceptor's place of business or residence. Under the common law interest is recoverable only by way of damages for a *wrong done*, and the acceptor has done none till after his liability attaches, *i. e.*, after presentment and demand: Anonymous, 6 Modern Rep. 138 (1705). See Keener, Quasi-Contracts, p. 154.

Carriers, Bill of Lading

When a draft is forwarded to a bank by a consignor of goods, accompanied by a bill of lading to the order of the consignor, the bank is made the agent of the consignor to receive and collect the draft, and to order the delivery of the goods, and the carrier is not liable for a conversion of the goods in delivering them to the proper owner and ultimate consignee, he having paid the draft to the bank, even though the bill of lading was not pro-

duced by him; and this notwithstanding the bill of lading directed the goods to be delivered on production of the same properly indorsed: *Witt* v. *East Tennessee & W. N. C. R. Co. et al.* (Supreme Court of Tennessee), 41 S. W. 1064.

Contract, Termination of

A contract to furnish materials to be used in the erection of a building, said materials to be delivered in such quantities and at such times as required and ordered, is not terminated at the date of the last delivery; but remains in force, in the absence of some act of the parties to the contrary, until the completion of the work in which such materials were used. *Bristol Brick Works* v. *King College* (Court of Chancery Appeals of Tennessee), 41 S. W. 1069.

Consideration, Moral Obligation

The Supreme Court of California has decided that the moral obligation to pay a debt is sufficient consideration for a promise to pay, made after the debt has been discharged by proceedings in insolvency: *Lambert* v. *Schmalz*, 50 Pac. 13.

Implied Contract, Agency

The Supreme Court of Vermont has decided that a railroad company under contract to transfer mail at certain points on its road is not liable on an implied contract for services of one, who, also under contract to make certain transfers of mail, fulfils the company's contract without its solicitation, and also under the impression that he is performing his own contract; it further appearing that the railroad company also understood that it was such person's duty to make the transfers: *Johnson* v. *Boston & M. R. Co.*, 38 Atl. 267.

Implied Promise

The Supreme Court of Florida has reiterated the principle that when one person has paid money in discharge of a liability which he has assumed at the request of another, or by his authority, the law implies a promise of indemnity on the part of the latter to the former: *Chamberlain* v. *Lesley*, 22 So. 736.

Corporation, Endorsement of Paper by Treasurer

The Court of Chancery of New Jersey has recently held that a treasurer of a manufacturing corporation can be clothed with apparent authority to endorse for it, by a long-continued course of business with the knowledge and consent of the directors; and that parties trusting to this apparent authority, although not receiving the paper on the faith of the previous endorsements, will be protected. It was further held that, although the directors may not in fact have known of the endorsements,

they were chargeable with knowledge of what they easily might and, in the reasonable performance of their duty, ought to have discovered: *Blake* v. *Mfg. Co.*, 38 Atl. 241.

Insolvency, Assets as Trust Fund

The Supreme Court of Tennessee has recently decided that when a corporation stops business owing to insolvency, and its directors adopt a resolution authorizing the president to file a bill in the Court of Chancery to have its assets administered, a trust *ipso facto* arises in favor of all its creditors and no one of them can reap the advantage of an execution to satisfy his judgment: *Memphis Barrel & Heading Co.* v. *Ward*, 42 S. W. 13. In this case the general creditors' bill on behalf of the corporation was not filed till almost an hour after the issuance of an instanter execution, and the levy under it. In the light of recent decisions of the Supreme Court of the United States, the conclusion of the Tennessee court would appear to be incorrect. In *Graham* v. *R. R. Co.*, 102 U. S. 148 (1880), it was held that a corporation owns its property, just as absolutely as an individual does and can make any disposition of it that it pleases. In *Hollins* v. *Brierfield Coal Co.*, 150 U. S. 371 (1893), the same view was held, and it was further decided that the so-called "trust" does not arise in favor of creditors until the assets are in the possession of a court of equity for administration. See, also, *Hospes* v. *Car Co.*, 48 Minn. 174 (1892), where Judge Mitchell said: "The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further." Can it be doubted that a levy under an execution against an individual, after he has stopped business, but before he has executed any trust, deed or assignment for the benefit of creditors would be supported? See Clark on Corp., pp. 539–546.

Divorce, Wife's Concealment of Pregnancy at Time of Marriage

Moss v. *Moss* [1897], Prob. 263, expressly decides a much disputed point by holding that concealment by a woman from her husband at the time of her marriage of the fact that she is then pregnant by another man is not a cause for divorce upon the ground of fraud. The interesting opinion of Jenne, Pres., declares, that "when there is consent no fraud inducing that consent is material." He criticises the leading American case to the contrary, *Reynolds* v. *Reynolds*, 3 Allen, (Mass.) 605 (1882), as introducing a novelty into the common law, adopts

Bishop's criticisms of that decision, and shows that it is impracticable to carry it out without limitations. His argument is very strong, and leads to the conclusion that a contrary result can and should be reached only by careful legislation.

Easement, User, Construction of Ancient Deed

The Superior Court of Pennsylvania has held that where a deed conveyed to the grantee the privilege of backing water on the land of the grantor as much as the said grantee may think necessary by a dam on his said place, the extent of the grant must be measured by the user, and therefore, when, in pursuance of the above grant, a dam was built a certain height and so maintained for fifty years, the present owner of the land on which the dam was built has no right to increase the height of the same, and thereby to increase the amount of water backed up upon the property of the plaintiff who claims under the original grantor: *Hogg* v. *Bailey*, 5 Pa. Super. 426.

Evidence, Confessions

The Supreme Court of California in *People* v. *Ammerman*, 50 Pac. 15, has decided that a statement made by one charged with a crime under such circumstances that it would probably be inadmissible as a voluntary confession, is admissible in evidence against him if it does not contain a confession of guilt. The prisoner was charged with robbery and immediately after his arrest, in the presence of the officer, the district attorney subjected him to a rigid examination, in the course of which the prisoner admitted that he had money on the day after the robbery. The district attorney then said: "If you can explain where you got that money there may not be any necessity for going on with this case." The prisoner answered, "I found it." At the trial the prisoner stated that this statement was not true and that it had been induced by the hope that he would be released. This evidence was objected to, but admitted, since the court were of opinion that while the prisoner had admitted matters which, when connected with other facts, tended to prove his guilt, still he had made no direct confession and "the term is restricted to acknowledgments of guilt."

Former Judgment

In *Gray* v. *Noonan* (S. C. Arizona), 50 Pac. 116, a sheriff had levied on plaintiff's goods as the goods of J. Plaintiff obtained judgment against the sheriff individually, but afterwards brought the present suit against the officer and his bondsmen on their official bond. The court held that the judgment in the former case, against

the sheriff personally, was not admissible in the action against his sureties and himself in his official capacity.

Refreshing Memory

The Supreme Court of California has gone rather far in approving the use of notes under circumstances which appear as follows: In an examination of a prisoner in the district attorney's office before his examination by the magistrate, the prisoner's testimony was taken down by a stenographer and afterward transcribed by him. At the trial he was allowed to read from the transcribed notes, as a means of refreshing his memory: *People* v. *Ammerman*, 50 Pac. 15.

Husband and Wife, Post-nuptial Gift, Fraud against Creditors

It was decided in *American Freehold Land & Mortgage Co. of London, Limited*, v. *Maxwell*, 22 So. (Fla.) 751, (1) that a married woman who claims property that has been levied on as her husband's, must be held to strict proof that it was purchased with her own money; (2) that a post-nuptial voluntary gift of real estate by husband to wife by deed, which was not recorded for ten years, the husband meanwhile retaining the possession thereof, was invalid as against his creditors. The transaction took place in Georgia prior to 1866, the date of the first married women's statute in that state; the husband had originally reduced his wife's money to possession by lending it on a mortgage, and had bought in this land at a sale under the mortgage; but it was held, nevertheless, that there was no implied trust in the land in favor of the wife, which would support the conveyance to her.

Chose in Action, Reduction to Possesion After Wife's Death

Curiously enough the old law of husband and wife is also recalled by *Hardin* v. *Young*, 41 S. W. (Tenn.) 1080. A wife was entitled by will to a one-seventh part of the proceeds of the sale of a piece of real estate after the death of a life tenant. She died before the life tenant. It was held that, though her husband had not during her lifetime reduced this chose in action to possession, he could properly do so after her death as her administrator for his own benefit as against her other heirs.

Separation Agreement, Equitable Defence

An admirable exposition of the law of separation agreements is found in the opinion of Pitney, V. C., in *Buttlar* v. *Buttlar*, 38 Atl. (N. J.) 300. A husband had defaulted in the payments specified in an elaborate agreement, the wife not being able under the New Jersey statute to sue in a common law action, filed a bill in equity against her husband to recover arrears. The court

held that the suit, though brought in equity only for the reason above stated, was subject to the equitable defence that he was unable to make the payments because of inability to rent the real estate, which was his only property, and upon the expectation of renting which the amount of the annuity had been based.

Wife's Estate, Liability for Husband's Debts

Trefethen v. *Lynam*, 38 Atl. (Supreme Court of Maine) 335, is the most recent exposition of an ever recurring subject. A wife owned real estate where she both housed her family and ran a hotel; from time to time her husband, who was a sailor, sent her remittances by checks, which were simply deposited in her hotel account. It was held (1) that the husband's creditors could hold her estate for the money thus received; (2) that the burden was upon her to prove, if true, that an equal amount had been taken out of the firm account to pay family expenses, which it was her husband's duty to pay; and (3) that, especially in the absence of a specific agreement, the wife cannot be allowed for rent of her real estate occupied by her family.

Injunction, Ticket Scalpers

The United States Circuit Court for the Middle District of Tennessee has recently granted injunctions to railroad companies restraining brokerage in railway tickets: *Nashville, C. & St. L. R.* v. *McConnell*, 82 Fed. 65. See 36 AM. L. REG. & REV. 57 (January, 1897), and 460 (July, 1897).

Juror, Competency of

The Supreme Court of Louisiana has decided that the statement of a petit juror that he had formed an opinion with regard to the guilt or innocence of the accused from a conversation that he had held with his brother, who had been a juror on a former trial in which the accused had been found guilty on the same indictment, was not disqualifying, the information thus imparted being hearsay merely: *State* v. *Williams*, 22 So. 759.

Grand Jury, Presence of Stenographer

The Supreme Court of Maine decided in *State* v. *Bowman*, 38 Atl. 331, that the presence of a stenographer in the grand jury room while witnesses are being examined invalidates the indictment founded on such testimony, although the stenographer was there to take notes by order of the court and retired before the grand jury commenced their deliberations.

This is in accordance with the policy of the law that the proceedings had before the grand jury shall be in secret, and the line is drawn at the threshold.

Land, "Fruits and Revenues," Cutting of Trees

The Supreme Court of Louisiana has held recently in *Frank* v. *Magee*, 22 So. 739 that where property is seized by the sheriff under a writ directing a sale, and pending his possession, but before sale, a trespasser enters and cuts standing trees, the severance does not make them fruits or revenues of the land, and if they are still upon the property at the time of sale, title to them would pass to the purchaser at such judicial sale as part of the realty. See, in accordance with this view, *Leidy* v. *Proctor*, 97 Pa. 486 (1881); *Rogers* v. *Gillinger*, 30 Pa. 185 (1876).

Landlord and Tenant, Lien on Products

A provision in a lease, that the lessee is not to dispose of any of the produce on the farm until the lessor has received the rent reserved in the lease, and certain stock, also part of the leased property, has been wintered through, gives the landlord no lien as against a creditor of the lessee: *Beers* v. *Field*, 38 Atl. (Supreme Court of Vermont) 270.

Libel, Charge of Unchastity, Justification, Evidence

In an action for libel for publishing the statement that plaintiff, a married woman, had eloped with one R., the chastity of the plaintiff was given great consideration and a large verdict for plaintiff resulted. On a motion for a new trial by defendant, based upon after-discovered evidence, it was held that, in spite of the general rule that "only the general reputation of plaintiff can be proven in reduction of damages in an action of libel," evidence of adulterous intercourse with R. might be introduced for the same purpose. "By suing for libel she may not open the door for an examination of all her past intercourse with any one, but she does invite an inspection of her relations with R.": *Smith* v. *Matthews*, 47 N. Y. Suppl. (Supreme Court) 96.

Life Insurance, Assignment

The Supreme Court of Colorado has arrayed itself with those courts which hold that, in the absence of power reserved in the contract, or in the charter or by-laws of the association incorporated into a policy made payable to a certain beneficiary, the insured has no assignable interest: *Love* v. *Clune*, 50 Pac. 34.

Enlargement of Class of Beneficiaries

In the same case it was decided that, where such an association is formed to benefit the heirs or families of the insured, a subsequent compulsory incorporation, under a statute including "assigns" as beneficiaries, will not enlarge the class of beneficiaries so as to

enable one insured before the change to cut out his heir in favor of a stranger: *Ibid.*

Powers of Insurance Agents

The rule that agents of insurance companies generally have power simply to receive and forward applications, has been recently applied by the Supreme Court of Oklahoma in determining the powers of the local lodges in a mutual life insurance order. Under the constitution and laws of the Home Forum Benefit Order it is provided that the local lodge may receive applications for benefit certificates, and that, if such applications are acceptable to the lodge and its medical examiner, they shall be forwarded to the Grand Secretary, who shall submit them to the Grand Medical Examiner, who has power to accept or reject the application. It is further provided that no beneficial certificate shall be binding upon the order until approved by the Grand Medical Examiner and signed by the President and Secretary of the order. The plaintiff's husband made application for a certificate. He was initiated into the local lodge, to which he paid initiation fees and dues; but, through the negligence of some one, the application was not forwarded to the Grand Medical Examiner until after his death. In reaching the result that there was no contract between the deceased and the corporation, the court seems to have been somewhat influenced by the view that the deceased, being a member, was supposed to know the rules of the order, and could, therefore, have been under no misapprehension as to the powers of the lodge as agent of the order: *Home, etc., Order* v. *Jones*, 50 Pac. 165.

Marine Insurance, Defence to Suit by Mortgagee of Ship

In a suit by a mortgagee of part interest in a ship, in his own name, on a policy of insurance taken out by the ship's owners upon the ship, "as well in their own names as for and in the name or names of all and every other person or persons to whom the same doth, may or shall appertain in part or in all" against, *inter alia*, perils of the sea and barratry by master and mariners, the fact that the captain wilfully cast the ship away is no defence; and the fact that the plaintiff's mortgagor was the captain, although he had become such through the act of the plaintiff, does not alter the result. If the captain be regarded as the captain of the plaintiff, the latter can recover in respect to a loss by barratry of the master. If he be regarded as a stranger to the plaintiff, the latter can recover as for a loss by a peril of the sea: *Small* v. *Insurance Co.*, [1897] 2 Q. B. 311.

The District Court for the Eastern District of Pennsylvania, per Butler, J., decided, in *Phillips* v. *The Pilot*, 82 Fed. 111, that a master of a tugboat is justified in assuming that a member of his crew is accustomed to all the ordinary duties required of men on such vessels. Therefore, where the master ordered one of the crew to jump ashore to attach a line, and the person received injuries by reason of his being unaccustomed to jumping, the master is not liable unless he had knowledge of the man's inability to do the act complained of.

Master and Servant, Knowledge of Duties

In *McDonald, Adm'r*, v. *Norfolk & W. R. Co.*, 27 S. E. 182, the Supreme Court of Virginia decided that if a brakeman is aware, on entering a railroad's employ, that he will be obliged to couple with mis-matched couplers, and continues in the service, and frequently performs that task, without complaining to the master, he assumes such risk. The peril was as obvious to him as to the company.

Risks Assumed by Employee

The Supreme Court of Tennessee, in an interesting case, recently held that where a party who had a right to a mechanic's lien takes, as collateral for a portion of his claim, mortgage bonds of the company against whom the lien is held, this act is presumed to be a waiver of the lien *pro tanto*. Such presumption, however, may be rebutted by testimony of the agreement and understanding of the parties to the arrangement. However, where the party who is entitled to the lien advises the company to execute a first mortgage, and bonds thereunder, a portion of which he retains as collateral for his debt, and the balance of which he encourages and aids the company in disposing of in the hope of getting his debt paid by the proceeds of the sale of such bonds, he is estopped as against *bona fide* purchasers of the first mortgage bonds from asserting his right of lien. There was nothing in the case to show that the purchasers took the bonds relying upon the representation of the party claiming the lien, but the court put their decision on the broad ground that a bond cannot be a first mortgage bond when there is any prior lien, and that, therefore, when the parties claiming the lien, permitted and encouraged the issuance of first mortgage bonds, they did an act inconsistent with the idea of the retention of the lien.

Mechanic's Lien, Waiver, Estoppel

It is submitted that this decision goes too far and that the court was scarcely warranted in finding that the consent and approval of the party entitled to the lien, to the issuance of a

first mortgage, was an authority to issue a first lien. A first mortgage does not necessarily import a first lien: *Bristol, Goodson Electric, Etc., Co.* v. *Bristol, Etc., Co.*, 42 S. W. 19.

Mortgage, After-acquired Property

A curious contention as to the effect of a mortgage of corporate property, including that to be acquired in the future, was made in the case of *Santa Fe Electric Co.* v. *Hitchcock*, 50 Pac. (New Mexico) 332. It was urged with success in the lower court that, as the corporation which gave this mortgage became merged in another company, the property of the latter was an accretion of the old company so as to fall within the mortgage. This position was, however, not adopted by the Supreme Court.

Mortgage of Assets of Business, Good-will

The sale of a business may include the good will, but a mortgage of all the assets of a business does not cover the good-will. So held in *Santa Fe Electric Co.* v. *Hitchcock*, 50 Pac. (N. M.) 322.

Navigable Streams, Rights of Riparian Owners

The Supreme Court of Ohio, in a very interesting case, has recently held that the riparian owner, who owned to the middle of a navigable stream, and who, therefore, had the use of the water to the middle of such stream, had not an exclusive use, but that his rights were subordinate to the paramount easement of navigation by the public. This easement of navigation includes the right of mooring vessels in the stream, to repair the same, and to fit and put in machinery after launching, and the riparian owner, beyond whose shore line such vessels are moored, cannot, in the absence of special injury shown, recover damages. This right, however, to moor vessels does not extend to the use of the riparian owner's land not covered by water, and therefore, where a ship builder brings his cables across the river bank and fastens them on the land of a riparian proprietor, and insists upon a right to continue such use, an injunction will be granted to restrain such use, although no injury is proved, and the land is unimproved: *Pollock* v. *Cleveland Shipbuilding Company*, 47 N. E. 582.

Foreshore Rights, Immemorial Easement

The Court of Appeal, Queen's Bench Division, has held that a right of owners of fishing boats, yachts, and other boats, to erect permanent moorings on the soil of the foreshore of a tidal or navigable stream, for the purpose of attaching their vessels thereto, could be supported either as an ordinary incident of navigation over such water or on the ground that the im-

memorial usage of such a right which was found as a fact by the jury, justified the presumption of a legal origin, either by grant from the Crown or by some subsequent owner of the foreshore: *Attorney General* v. *Wright*, [1897] 2 Q. B. 318.

Negligence, Stopping Train With a "Jerk," Judicial Notice

According to the New York Supreme Court as found in their decision in *Jonas* v. *Long Island R. Co.*, 47 N. Y. Suppl. 149, a trial court is not bound to take judicial notice that a train can be brought from motion to a state of inertia without impact or "jerk" of some degree. Therefore, where the plaintiff fell from the train as a result of a "jerk," in bringing the train to a standstill, he is not entitled to recover, unless some evidence is offered to show the "jerk" was avoidable with the exercise of reasonable care, or that the "jerk" was of more than ordinary violence.

Partnership, Agency, Death

Where one firm procures an order for another and before the goods are delivered to the purchasers, a member of the former firm dies, his estate is not responsible to the latter firm for the purchase money collected after his death: *Friend* v. *Young*, [1897] 2 Ch. 421.

Patents, Infringement, Laches

The Circuit Court of the Northern District of New York has held that where a patentee sleeps on his rights for fourteen years he has no standing to sue for an infringement of his patent, as his right is lost by his own laches. The fact that the co-owners of the patent had no faith in its validity, and declined to prosecute suits for infringements, is no excuse for or justification of such laches, as the plaintiff could have proceeded alone and made his co-owners defendants, if they had declined to join as plaintiffs: *Richardson* v. *Osborne*, 88 Fed. 95.

Practice, Essential of Statement of Plaintiff's Demand

The Supreme Court of Pennsylvania has considered a number of questions under the Act of May 12, 1887, which effected a marked change in procedure in this state. The statute provided, *inter alia*, that the declaration shall consist of a concise statement of the plaintiff's demand, which "shall be accompanied by copies of all notes, contracts, book entries . . . upon which plaintiff's claim is founded." In a recent appeal the record showed that an action of assumpsit was brought to recover from the defendant, as a guarantor, an amount alleged to be due by a principal debtor for goods sold

and delivered to him by the plaintiff. A copy of an undated contract or undertaking, signed and sealed by the defendant, was annexed to the plaintiff's statement. Accompanying this was what purported to be a copy of the paper, on which the defendant's undertaking was endorsed. This last copy, however, was a blank form of order for bicycles, addressed to the plaintiff, containing blank spaces, evidently intended to be used in specifying the kind, quantity, values, etc., of the goods to be ordered. The only written words which the order contained were the signature of the person giving the order and the words "quantity and specifications already sent in."

Chief Justice Sterrett, in his opinion, cited *Byrne* v. *Hayden*, 124 Pa. 170 (1889), and *Bank* v. *Ellis*, 161 Pa. 241 (1894). He quoted from the latter: "To entitle plaintiff to judgment for want of a sufficient affidavit of defence, the statement of his demand must be self-sustaining—that is to say, it must set forth, in clear and concise terms, a good cause of action—by which is meant such averments of fact as, if not controverted, would entitle him to a verdict for the amount of his claim . . . All the essential ingredients of a complete cause of action must affirmatively appear in the statement and exhibits which are made part thereof." The Chief Justice further said, referring to the provision of the statute above recited: "This is not merely directory—it is absolutely imperative; and if the copy of the written or printed contract on which the action is founded, or any part thereof, does not accompany the statement, and its absence is not satisfactorily accounted for, the omission cannot be supplied by averments of the contents or substance of the missing paper. Without the defendant's consent such averments cannot be accepted as the legal equivalent of the 'copy' or 'copies' required by the Act, except in the case of papers shown to have been lost or destroyed." It was held that the statement was incomplete and insufficient, and defendant was not bound to answer it: *Acme Mfg. Co.* v. *Reed*, 181 Pa. 382 (1897).

In connection with the foregoing case we may notice one in the State of New York. The Supreme Court, Appellate Di-

Insufficient Statement

vision, Third Department, in a *per curiam* opinion on October 1, 1897, decided that the following statement was insufficient to meet the requirements of Section 1274 of the Code of Civil Procedure, under doctrines established in *Wood* v. *Mitchell*, 117 N. Y. 429:

"This confession of judgment is for a debt and liability justly due to the said plaintiff, arising upon the following facts, viz.,

being for a balance due for goods, wares, and merchandise sold and delivered to me, Fred. C. Greene, by the plaintiff, William W. Blackmer, and remaining unpaid and unreceived." The above section of the Code provides that the statement "must state concisely the facts out of which the debt arose, and must show that the sum confessed therefor is justly due, etc.": *Blackmer* v. *Greene*, 47 N. Y. Suppl. 113.

Promissory Notes Promise to Pay Attorney's Fee

A provision in a note promising to pay, in addition to the principal sum, "the further sum of ten per cent. upon amount found due" in case suit was brought on the note, does not render the note non-negotiable: *Salisbury* v. *Stewart*, 49 Pac. (Utah) 777.

Probably in accord with the weight of authority: See *Sperry* v. *Horr*, 32 Ia. 184 (1871), *accord;* and *Woods* v. *North*, 84 Pa. 407 (1877), *contra.*

Indorsement, Guarantee

A note, payable to the maker's order, had on the back of it the following: "Pay to the order of ————, to whom we guarantee payment, etc." Names of the payee were signed below the guarantee. *Held*, an indorsement: *Byers* v. *Bellan-Price Ins.*, 50 Pac. (Col.) 368. The maker and the payee being the same, the guarantee was meaningless and could be stricken out. The general rule is that a guarantee by a payee or any subsequent party to a bill or note will not operate as an endorsement thereof. See *Belcher* v. *Smith*, 7 Cushing, 224 (1851), and note thereto in Ames' Cases on Bills and Notes, Vol. I., p. 225.

Indorsement, Consideration

Where a creditor accepts his debtor's note in payment, on the strength of an indorsement made for that purpose, his relinquishment of his right to proceed against the maker, upon the pre-existing debt, furnishes a consideration as against the indorser, though the note is payable on demand: *Kelly* v. *Theiss*, 47 N. Y. Suppl. 145 (Supreme Court). The debtor's note being taken in payment and not as security for the debt, the creditor becomes a purchaser for value: *Brown* v. *Leavitt*, 31 N. Y. 113 (1865). The rule is otherwise in New York, if the note is taken as security for the debt: *Bay* v. *Coddington*, 5 Johnson's Ch. Rep. 54 (1821).

An action for money had and received cannot be maintained

by a corporation to recover a sum received by a former director as a bribe for resigning his office and procuring control of the corporation to be turned over to the purchaser for corrupt purposes.

Quasi Contracts, Money Had and Received

The only remedy of a corporation in such a case is an action to recover damages for the fraud practised upon it by the director: *McClure* v. *Law*, 47 N. Y. Suppl. (Supreme Court) 84.

Indebitatus assumpsit can only be elected as a remedy for those torts in the commission of which the tort-feasor has enriched himself at the expense of the plaintiff by taking or using the plaintiff's property: See *Phillips* v. *Homfray*, 24 Ch. Div. 439 (1883).

"Money had and received," will lie against mortgagee who has received more money in payment of mortgage than the mortgage actually called for. The mortgagor may have this action, even though he has also an action against his agent, who fraudulently so paid the over amount: *Tewatsch* v. *Cooney*, 47 N. Y. Suppl. (Supreme Court) 541.

Money Paid on Mortgage

This is an ordinary example of the quasi-contractual right to recover money paid under mistake. See Keener on Quasi-Contracts, Chap. II.

In *Miller* v. *Roberts*, 47 N. E. 585, the plaintiff conveyed his farm to a third person, for the benefit of defendant, in consideration of defendant's oral promise to convey to him another farm. The defendant refusing to convey, the plaintiff was permitted to recover to the extent of the benefit conferred upon the defendant, even though the defendant's promise was non-enforcible by reason of the Statute of Frauds, and, furthermore, that even though the plaintiff had received, prior to the breach, from the defendant certain articles of personal property as part of the consideration for his conveyance, for though he must account for their value, yet he was not bound to return the same before bringing suit, as the plaintiff had not rescinded the contract.

Restitution, Default in Contract, Statute of Frauds

The duty of a defendant under a contract non-enforcible by reason of the Statute of Frauds is to make restitution of the benefits received by the plaintiff's performance: See *Dowling* v. *McKenney*, 124 Mass. 478 (1878), for the principles applicable to this doctrine.

Where a county, liable for expenses, has paid expenses,

Money Paid, Recovery

for a part of which by special act a separate court house district was liable, the payment is not voluntary, and can be recovered from the court house district: *Campbell County* v. *Commissioners of Court House District*, 42 S.W. (Ky.) 111. This is an example of the rule that where a plaintiff pays the claim of a third person existing against both the plaintiff and the defendant, but which should be paid by the defendant, the plaintiff may recover the same from the defendant as money paid to the defendant's use: *Brown* v. *Hodgson*, 4 Taunton, 189 (1811).

Railroads, Negligence, Derricks

Plaintiff's son was killed while acting as brakeman on defendant's train, by being struck by a derrick which had been erected over the track by defendant, and of whose existence decedent was aware. Defendant contended that "it is not negligence in a railroad company to construct or permit to be constructed overhead hanging bridges, etc., over its tracks so low as not to permit a brakeman to stand upright on the top of a box car. Lower court took this view and held complaint insufficient; but the Supreme Court in sending the case back to the jury, declared, "it is rare that abstract principles of law are so fixed and absolute as not to be modified or controlled by the special facts of the case to which they are sought to be applied:" *Gusman & Caffery Cent. Refinery* v. *Railroad Co.*, 22 So. (La.) 742.

Receiver's Personal Liability for Costs

Though an altogether unprofitable decision to the general practitioner, *First National Bank of Canton* v. *Washburn*, 47 N. Y. Suppl. 117, is of value as a reminder that a receiver who unnecessarily opposes an honest claim may make himself personally liable for the resulting costs.

Religious Societies, Contract of Pastorate

The Supreme Court of Oklahoma has decided that when, under the rules and discipline of a religious organization, a "call" to the pastorate of a church owing allegiance to such organization, is not effective until formally sanctioned by the presbytery thereof, such call not so sanctioned creates no civil contract: *First Presbyterian Church of Perry* v. *Myers*, 50 Pac. 70.

Where goods are shipped C. O. D., and the consignee re-

fused to accept them, but after a lapse of ten months, during which time no agreement was reached, the consignor agrees to accept the consignee's note for the goods and to "arrange to turn the goods over," the consignee is not liable on the note, or for the value of the goods, he having failed to receive them through the fault of the carrier in whose custody the goods were: *Cole* v. *Rankin* (Court of Chancery Appeals of Tennessee), 42 S. W. 72.

Sale, Delivery, Liability for Loss

The stranding of the "St. Paul" on the New Jersey coast on the 24th of January, 1896, excited a great deal of interest throughout the country, and the successful manner in which the passengers, mails and cargo were removed, and finally the vessel itself extricated from its predicament but a few days before some violent storms, is probably well remembered. Considering that the vessel was valued at over two million dollars, and the cargo, consisting largely of specie, at nearly that amount, and that pretty much the whole wrecking force of the eastern coast was engaged in the work, the decree of $160,000 for the salvage services seems quite moderate. This case applies the well-recognized principle that the community of interest between the vessel and her cargo ceases upon the unloading of the latter, and, as that was accomplished at the end of the first four of the eleven days required for the entire task, the cargo was charged with a little less than two-elevenths of the whole award: *The St. Paul*, 82 Fed. 104. (Dist. Ct., S. D. of N. Y.)

Salvage

The Supreme Judicial Court of Maine has lately ruled on an important and, indeed, fundamental question of law which seems never before to have been adjudicated, viz., the time in which a search warrant must be executed when no time is fixed by the terms of the warrant itself. The court in the case in which the question arose decided that the warrant (which authorized a search for intoxicating liquors), in the absence of reasons for the delay, became *functus officio* after a reasonable time; that what was a reasonable time was a question for the court; and that three days having elapsed in this case the warrant could not be lawfully executed: *State* v. *Guthrie*, 38 Atl. 368.

Search Warrant, Time of Execution

Where there is a running account between two parties, cer-

tain items of which are barred by the Statute of Limitations, a payment of a portion of the amount due, unappropriated by the debtor to the items barred, will not toll the statute as to those items. But it may, with the other circumstances of the case, be evidence of the intention of the debtor in making the payment. Thus where, apart from the statute-barred items, the amount due at the time of payment is less than the amount of that payment; where the payment is stated to be "on account," and made expressly with reference to a statement of account including the statute-barred items, the court will treat it as an acknowledgment of an account on which a balance greater than the amount paid will be due; and will imply a promise to pay that balance: *Friend* v. *Young*, [1897], 2 Ch. 421.

Statute of Limitations, Acknowledgment of Debt

The Supreme Court of Errors of Connecticut has decided that, under a statute forbidding the construction and extension of street railways, except on a finding by the court that public convenience and necessity require such construction or extension, the applicants' financial ability to build such railway is a circumstance to be considered. *In re Shelton Street Railway Co.*, 38 Atl. 362.

Street Railways, Application for Leave to Construct

The rule that equality is equity, usually determines the liability of sureties *inter se;* but where, as in *Pile* v. *McCoy*, 41 S. W. (Tenn.) 1052, the guardian's default is occasioned by his paying his personal debt to one of the sureties out of his ward's estate, the innocent surety, if compelled to make good the guardian's default, can recover the whole amount from his co-surety, who caused and received the benefit of that default.

Suretyship, Contribution

It has been decided by the Supreme Court of Nevada that the net earnings of a railroad, forming the basis of valuation for taxation, are determined by deducting the necessary expenses, under reasonably economical and prudent management, from the gross earnings under similar management; and that a reduction of $13,839 in the pay roll of a railroad during 1896, coupled with proof that no more officers and employes were necessarily required in 1895 than in 1896, will justify a jury in finding that the actual expenses during 1895 could have been reasonably reduced $13,839: *State* v. *Virginia & T. R. Co.*, 49 Pac. 945.

Taxation, Railroad, Reduction of Expenses

Will, Legacy, Void Condition

A will provided that the testator's daughter should be entitled to receive a certain share of the income of a residuary trust estate on condition that she should remain on the continent of Europe during the lifetime of her husband (who resided in New York), unless absolutely divorced from him. The New York Supreme Court in interpreting this provision declined to recognize the validity of the superadded condition and affirmed the well settled rule that a condition attached to a legacy which tends to separate husband and wife, and to compel them to live apart, is void, as opposed to public policy: *Cruger* v. *Phelps*, 47 N. Y. Suppl. 61.

Will, Gift to a Class, Mistake as to Number

The Court of Chancery in England, *In re Groom*, [1897], 2 Ch. 407, has recently been called upon to interpret a will containing a bequest by a testator of £4000 to his trustees "in trust for the two children of W. in equal shares as tenants in common, to be paid to them on respectively attaining the age of twenty-one years, or marrying under that age." At the time the bequest was made W. had four children living. It was held, following *Lee* v. *Pain*, 4 Hare, 249 (1849), that the four children were entitled to take equally, the word "two" being rejected upon the presumption of mistake.

It is well to note, however, that the rule may be overthrown when there are circumstances from which inferences can be drawn as to the particular children intended to be benefited, as was the case in *Newman* v. *Piercy*, 4 Ch. Div. 41 (1876); and also that the rule is not extended to a bequest to an individual or the children of an individual when there is more than one in existence answering to the description of the individual, such bequest being void for uncertainty, as was held in *In re Stevenson*, [1897], 1 Ch. 75.